PERTAMA MALAYSIA FINANCE BHD.

v.

KONREP SEVICES SDN. BHD. & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 23-470-86]
24 OCTOBER 1989

CIVIL PROCEDURE: *Summary judgment - Order 14 Application - Whether triable issues raised - Conduct of solicitor in the course of conveyancing transaction - Solicitor whether negligent.*

This is an application for summary judgment under O. 14 of the Rules of the High Court 1980, arising out of an action by the plaintiff, a finance company, against their solicitor alleging negligence, breach of undertaking and unprofessional conduct in the course of a conveyancing transaction.

The plaintiff complaints that the fourth defendant had, contrary to his written undertaking, released a sum of RM200,000 entrusted to him being money lent to the borrower, the first defendant, for the purpose of purchasing certain immovable property, then subject to caveats, to the vendor's solicitor, without first ensuring the registration of a charge in their favour to be executed by the first defendant.

The fourth defendant's defence is that he was never negligent, that the undertaking given was a conditional one and that he had fulfilled that undertaking. It was also contended that the plaintiffs knew of the encumbrances to which the property was subject, namely the caveats, and yet agreed to the release of the loan on his qualified undertaking to take steps to remove the caveats and the plaintiffs were informed of all subsequent developments.

It was further contended that at no time did the plaintiffs impose any time limit nor was time made the essence for the purpose of the fourth defendant complying with the qualified undertaking. The plaintiffs had also been briefed of the problems encountered in attempting to secure registration of the charge in the face of the caveats and the plaintiffs had agreed that they could not hold the fourth defendant to his qualified undertaking. Accordingly, the fourth defendant contended that the plaintiffs had either expressly or impliedly waived and relieved him of his qualified undertaking.

Held:

[1] The effect of O. 14 is to deny a litigant the fundamental right to defend himself in Court. Only if the Court is convinced in its own mind that a defendant has no defence worthwhile listening to, should he be precluded from defending. In other circumstances, leave to defend should be given.

[2] In the present case, the fourth defendant had raised an issue of law, namely, the interpretation to be placed on the undertaking. The undertaking will have to be construed, having regard to the surrounding circumstances, that is to say, the facts of the case, as to which there is a dispute. The fourth defendant had also raised a defence of waiver which was denied by the plaintiffs and this discloses a serious disagreement as to the facts.

[Application for summary judgment is therefore dismissed with costs.]

Cases referred to:
Codd v. Delap [1905] 92 LT 510
Jones v. Stone [1894] AC 122
Ward v. Plumbley [1890] 6 TLR 198
Miles v. Bull [1969] 1 QB 258
Carol v. Cases [1949] 1 KB 474
Paclantic Financing Co. Inc v. Moscow Narodny Bank Ltd. [1984] 1 WLR 931

Legislation referred to:
Rules of the High Court 1980, O. 14 rr. 3, 4

For the plaintiffs - Mohd Nor; M/s. Wong-Chooi & Mohd Nor
For the 1st and 3rd defendants - Foong Kai Choon Penang
For the 2nd defendant - Abdul Razak bin Yaacob; M/s. Razak & Co.
For the 4th defendant - Rumi Manecksha; M/s. Daud & Partners

JUDGMENT

Edgar Joseph Jr J:

This is an application for summary judgment under O. 14 of the Rules of the High Court 1980, arising out of an action by the plaintiffs, a finance company, against their solicitor (the fourth defendant - "D4" for short), alleging negligence, breach of undertaking and unprofessional conduct in the course of a conveyancing transaction.

The particulars of the plaintiffs' claims against D4 and the latter's defence appear sufficiently from the pleadings annexed to the record. It would thus be tedious and unnecessary to reproduce these particulars. Suffice it to say that the plaintiffs' complaint is that D4 had, contrary to his written undertaking, released a sum of RM200,000 entrusted to him being money lent to the borrower - the first defendant ("D1", for short) - for the purpose of purchasing certain immovable property, then subject to caveats, to the vendor's solicitors, without first ensuring the registration of a charge in their favour to be executed by D1.

On the other hand, D4's defence is that he was never negligent, that the undertaking given was a conditional one, and that he had fulfilled those conditions. More particularly, D4 contends that at all material times, the plaintiffs knew of the encumbrances to which the property was subject, namely the caveats, and yet agreed to the release of the loan on his qualified undertaking to take steps to remove the caveats and the plaintiffs were informed of all subsequent developments.

It was further contended by D4:

(1) that at no time did the plaintiffs impose any time limit nor was it made the essence for the purpose of D4 complying with the qualified undertaking.

(2) that following discussions between the plaintiffs and D4 in the course of which the plaintiffs had been briefed of the problems encountered in attempting to secure registration of the charge in the face of the caveats, the plaintiffs had agreed that they could not hold D4 to his qualified undertaking and that action should be taken against the second and third defendants.

Defendants - ("D2" and "D3", for short) they being the directors of D1 and the guarantors of the loan, to recover the outstanding balance.

Accordingly, D4 contends that the plaintiffs had either expressly or impliedly waived and relieved him of his qualified undertaking.

The rules formulating the criterion on which a defendant is to be let in to defend an action in which the plaintiff has applied for summary judgment are clearly set out in O. 14 rr. 3 and 4 of the Rules of the High Court 1980 and the cases thereon are too well known to need citation.

Nevertheless, I shall make a passing reference to some of the principles and a few of the cases.

It was submitted by Counsel for D4, and I agree that the hurdle which a defendant has to clear is modest and unless his defence is practically moonshine he should be given leave to defend. (See Lord Lindley in *Codd v. Delap*) [1905] 92 LT 510 HL. The reason for this is not hard to see, namely, the effect of O. 14 is to deny a litigant the fundamental right to defend himself in Court. Accordingly, only if the Court is convinced in its own mind that a defendant has no defence worthwhile listening to, should he be precluded from defending. In any other circumstances, leave to defend should be given. (See e.g., *Jones v. Stone* [1894] AC 122 and *Ward v. Plumbley* [1890] 6 TLR 198).

So, for example, Megarry J in *Miles v. Bull* [1969] 1 QB 258 had occasion to refer to the requirement of rules that the defendant is to satisfy the Court that "there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial" and he commented that these words were very wide. His Lordship went on to say if the question were whether there was an arguable defence on the material before him, he would have had to answer "No". But, he was satisfied, that there were circumstances which should be investigated and he affirmed the order giving leave to defend.

In the present case, D4 had raised an issue of law namely, the interpretation to be placed on the undertaking. He argues that it is conditional. If a legal point advanced on behalf of a defendant is quite clearly unarguable the Court has precisely the same duty as it has in any other case. Its duty then is to enter judgment for the plaintiff under the rule. (See *Carol v. Cases* [1949] 1 KB 474).

Now, the undertaking will have to be construed, having regard to the surrounding circumstances, that is to say, the facts of the case, as to which there is a dispute.

Again D4 has raised a defence of waiver following discussions which he claims he had with representatives of the plaintiffs. These are denied by the plaintiffs. In my opinion, this discloses a serious disagreement as to the facts.

In such a situation, even if I am of the opinion that D4's prospects of success at the full hearing are slim, it would not be possible to make a final judgment on the matter without actually seeing and hearing the witnesses in the witness box and observing them testify. A trial on affidavits would be clearly wrong. Accordingly, unconditional leave to defend should be given and I so order. (See *Paclantic Financing Co. Inc. v. Moscow Narodny Bank Ltd.* [1984] 1 WLR 931).

The result, therefore, is that the application for summary judgment is dismissed and with costs.

Also found at [1990] 1 CLJ 127